TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
1. Proceedings Below	2
2. Statement of Facts	3
ARGUMENT	4
CONCLUSION	10

TABLE OF CITATIONS

Cases

Adler v. Board of Education, 342 U.S. 485 (1952)	8
Barnes v. Merritt, 376 F.2d 8 (5th Cir., 1967)	9
Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972)	7, 8, 9
Connelly v. University of Vermont, 274 F. Supp, 156 (D.C. Vt. 1965)	9
Gaston County v. United States, 395 U.S. 285 (1968)	8
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	8
Hetrick v. Martin, 480 F.2d 705 (6th Cir., 1973)	5
Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966)	8
Keyeshian v. Board of Regents, 385 U.S. 589 (1967)	5, 8
Pickering v. Board of Education, 391 U.S. 563 (1968)	4, 5, 6, 7, 8
Shelton v. Tucker, 364 U.S. 479 (1960)	8

PAGE

Sweezy v. New Hampshire, 354 U.S. 234 (1957)... 8

Tinker v. Des. Moines Indep. Community School Dist. 393 U.S. 503 (1969)..... 8

Statutes

Federal Rules of Civil Procedure:
Rule 12(b)..... 2

Supreme Court Rule 19..... 4

42 U.S.C.A. 1983..... 2

Article 77A, Section 11, Annotated Code of Maryland..... 3

Article 77A, Section 12, Annotated Code of Maryland..... 3

Articles

Kirp, "Schools as Sorters: The Constitutional and Policy Implications of Student Classification," 121 U. Pa. L. Rev. 705 (1973)..... 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5821

ANTHONY WOJLOH,

Petitioner,

v.

MATHIAS J. DEVITO, ET AL.,

Respondents.

IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BRIEF OF RESPONDENTS

QUESTION PRESENTED

Are the grading practices of a teacher, manifested specifically in the teacher's refusal to change failing grades given to two students, speech which is protected by the First Amendment to the Constitution so that his refusal cannot be considered by his school administration in determining whether he should be hired again after the expiration of his contract?

STATEMENT OF THE CASE

1. Proceedings Below

Anthony Wojloh (the Petitioner, hereinafter Wojloh) filed a complaint (R. 4) against Dr. Calvin W. Burnett, President of Coppin State College (hereinafter "Burnett"), the Board of Trustees of the State Colleges (hereinafter the "Board"), Flossie Dedmond, Dean of the Arts and Sciences Department, and Dr. Chester W. Gregory, Chairman of the Social Sciences Division, (hereinafter the "Deans"), and Dr. Cleveland Chandler, Dean of the College (hereinafter "Chandler"). Chandler was never served with process, and Wojloh elected to proceed without making him a party to this suit.

Burnett and the Board filed a motion to dismiss the complaint pursuant to Rule 12(b) upon the ground that the complaint failed to state a claim upon which relief could be granted (R. 59). The Deans filed separate motions for summary judgment and supporting affidavits (R. 81, 103). Wojloh responded by filing various motions in opposition and supporting affidavits (R. 91, 113, 138, 143).

Wojloh alleged in his complaint that the failure of Burnett and the Board to renew his contract with Coppin State College violated his rights to procedural due process and his right to freedom of speech and, hence, that he was entitled to relief under 42 U.S.C.A. 1983. Treating the motion to dismiss of Burnett and the Board as a motion for summary judgment, and considering also the motion for summary judgment filed by the Deans, the United States District Court for the District of Maryland (Alexander Harvey, II, presiding) dismissed Wojloh's First Amendment claims without leave to amend and dismissed Wojloh's due process claims with leave to amend (R. 168, 170).

Wojloh elected not to amend, abandoned his due process claims, and appealed the dismissal of his First Amendment claims. The Court of Appeals for the Fourth Circuit affirmed that dismissal. Wojloh has petitioned this Court to review that affirmance.

2. Statement of Facts

Coppin State College is an agency of the State of Maryland. It is administered by Burnett, its President, and is one of seven institutions governed by the Board. See Article 77A, Sections 11 and 12, Annotated Code of Maryland. Wojloh was employed without tenure in the rank of professor at the college during the academic year 1971 to 1972 under a contract with the college (which is Exhibit A to the Complaint, R. 16) which expired by its own terms on June 30, 1972. The Deans and Chandler held various administrative positions at the college during the academic year 1971 to 1972, in which the events in question occurred. Subsequent to the occurrence of a dispute between Wojloh, on the one hand, and the Deans, on the other hand, over grades given by Wojloh to two students, Burnett advised Wojloh by letter dated June 18, 1972, that he would not be hired again for the next academic year.

Wojloh alleged in his complaint that this "dismissal was caused solely by his refusal to change failing grades to two students" and his complaints and disputes with various persons which ensued from his refusal (R. 12). The affidavits presented by Wojloh in support of his complaint reiterated Wojloh's claims that the Deans requested him to change the grades, that he refused, that someone changed the grades, and that Wojloh carried his dispute with the Deans to other persons at the college, including Burnett and the Board, in an attempt to resolve the dispute in his favor. There are no allegations, either in the complaint or in the affidavits,

that the Board participated in Burnett's decision or action in not rehiring Wojloh. Indeed, the only allegation concerning the Board at all is that Wojloh once complained to the Board that the two grades were changed. There is no allegation that the Board acted in any manner whatsoever concerning the dispute. Wojloh's dispute was conducted by him primarily with his immediate superiors, the Deans.

Although for the purposes of a Motion for Summary Judgment, the allegations in the Complaint are considered to be true, nevertheless, it is significant that the Deans, in support of their motion, denied in their affidavits that they requested Wojloh to change the grades in question, and Dr. Gregory, Chairman of the Social Sciences Division, where Wojloh taught, denied that the grades were, in fact, changed (R. 54a-60a, 64a-70a).

ARGUMENT

Rule 19 of the Supreme Court Rules sets forth considerations for determining whether a petition for certiorari should be granted. The sole consideration asserted by Wojloh is that his case raises an "important question" of free speech which has not been and should be settled by this Court, namely, that the right to teach bears a corollary right to grade. Wojloh advances no other considerations under Rule 19 in support of the grant of the petition. In fact, the question presented has long been decided and deserves no further attention from this Court.

It is fundamental that not all speech is protected, *Pickering v. Board of Education*, 391 U.S. 563 (1968), and, *a fortiori*, is not protected when combined with actions which have no constitutional protection as speech. These principles raise a contradiction in Wojloh's petition. He begins, as he did in the proceedings below, by

asserting an "absolute right to grade." Petition of Wojloh, p. 4-5. Later, however, he states he does not have a "vested right to an unfettered discretion to grade." Petition of Wojloh, p. 9.

It is apparent that we would not be before this Court if Wojloh had initially recognized restraints on his grading practices or even if he had later recognized such restraints. However, neither of those events ever occurred, and Wojloh only now begins to realize the limitations on his grading practices and leaves unresolved the contradiction in his assertions before this Court.

The issuing of grades does not involve the traditional concept of protected speech in the classroom's "market place of ideas," *Keyshian v. Board of Regents*, 385 U.S. 589, 603 (1967), or in "matters of public interest" outside the classroom. *Pickering v. Board of Education*, 391 U.S. 563 (1968). Grades, as the District Court observed, are measuring sticks used to determine whether a student has met the school's requirements for a degree. Consequently, when Wojloh issued failing grades to the two students, he did more than merely express his opinion of the quality of their work. He took an action which, unless corrected by the college, represented the judgment of the college that the students did not meet the college's requirements for a degree.

In short, his issuing the grades was an action, not protected speech. His issuing the grades and his refusal to change them was as much a part of his pedagogical attitudes and techniques as, for example, his ability to lecture. Consequently, his actions relate to the efficiency of his performance in fulfilling the goals of the college and may be considered by the college in determining whether to retain his services. Such actions are not protected speech. *Hetrick v. Martin*, 480 F.2d 705

(6th Cir. 1973), is a controlling authority on judicial non-intervention in matters of teaching policy. In *Hetrick*, the Court of Appeals refused to intervene in the dismissal of a teacher for deviations from teaching standards, although the Court felt the deviations were superficial.

The relation of Wojloh's actions to the efficiency of his performance in fulfilling the goals of the college is further apparent when it is considered that the judgment of the college that a student does not meet its academic requirements has important consequences for both the student and the college. See Kirp, "Schools as Sorters: The Constitutional and Policy Implications of Student Classification," 121 U. Pa. L. Rev. 705 (1973). In order that both the college and the students be protected, as well as in order to insure that the college's educational goals are met, it is important that grading at the college be under control of the college, not under as many different controls as there are teachers at the school. To some extent the authority to issue grades must, for obvious practical and administrative reasons, be delegated to teachers, but the ultimate responsibility for the award of grades remains and must remain with the college. Consequently, the manner in which a teacher exercises the authority to issue grades clearly relates to the quality of his performance, which may be considered by the college in determining whether to retain his services. As a further result, even if the issuing of grades may carry certain characteristics of speech or expression, it is clear the State's interest is "promoting the efficiency of the public services it performs through its employees" and here predominates. *Pickering v. Board of Education, supra*, at 568.

Looking beyond Wojloh's pedagogical attitudes and techniques as manifested by his grading practices, it is

clear from the complaint and affidavits that any speech actually uttered by Wojloh which is alleged to be relevant and material to this case is related solely to his disputes with his supervisors concerning his grading of the two students. In this regard, the Fourth Circuit has said:

> "*Some of the affidavits refer to what seems to be bickering and running disputes with the department heads. We do not intend to suggest that that kind of speech is protected by the First Amendment in the sense that it may not be considered in connection with the termination of the employment relationship. A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the head of the department.* If one cannot or does not, if one undertakes to seize the authority and prerogatives of the department head, *he does not immunize himself against loss of his position simply because his noncooperation and aggressive conduct are verbalized.*
>
> "General public criticism of public institutions stands on a different plane, however, as *Perry v. Sindermann* makes clear, and publicly financed educational institutions may not terminate the employment of nontenured teachers who voice such criticism if the criticism causes the termination." *Chitwood v. Feaster,* 468 F.2d 359, 360-361 (4th Cir. 1972) (Emphasis supplied).

The speech engaged in by Wojloh, as described in the Complaint, does not fall within the protected category of "comment on matters of public interest" or "public attention." *Pickering v. Board of Education, supra,* at 568, 571. Instead, Wojloh's conduct consisted of "complaints" of acts of Wojloh's immediate superiors, the Deans, regarding the grades that Wojloh had awarded to certain students. This is the type of conduct that is *not* constitutionally protected and which can, therefore, be

used as a basis for termination of employment, for it involves "maintaining . . . discipline by immediate superiors" (*Pickering v. Board of Education, supra,* at 570), as well as "bickering and running disputes with the department heads" and the failure of the "teacher to follow instructions and to work cooperatively and harmoniously with the head of the department." *Chitwood v. Feaster, supra,* at 360.

The cases cited by Petitioner support the opinion of the District Court, namely, that only in cases involving infringement of constitutionally protected rights will intervention by the Courts be appropriate. Where, for example, state officials are alleged to have interfered with the political rights of an individual or to have discriminated on the basis of race, the Court should consider the constitutional implications of the alleged actions. However, as noted above, the actions alleged by Wojloh do not affect a right protected by the First Amendment. Nearly all of the cases cited by Wojloh relate to the suppression of political rights or discrimination on the basis of race. Infringement of political rights was involved in *Sweezy v. New Hampshire,* 354 U.S. 234 (1957) (Petition of Wojloh, page 6); *Keyeshian v. Board of Regents,* 358 U.S. 389 (1969) (Petition of Wojloh, page 6); *Shelton v. Tucker,* 364 U.S. 479 (1960) (Petition of Wojloh, page 8); *Adler v. Board of Education,* 342 U.S. 485 (1952) (Petition of Wojloh, page 10); *Tinker v. Des Moines Indep. Community School District,* 393 U.S. 503 (1969) (Petition of Wojloh, page 10). Racial discrimination was involved in *Johnson v. Branch,* 364 F.2d 177 (4th Cir. 1966) (Petition of Wojloh, page 6); *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) (Petition of Wojloh, page 9); *Gaston County v. United States,* 395 U.S. 285 (1968) (Petition of Wojloh, page 9).

In *Connelly v. University of Vermont*, 244 F. Supp. 150 (D.C. Vt. 1965) (Petition of Wojloh, page 8), the Court apparently held that it might constitute a denial of due process for an instructor to refuse arbitrarily to give a student a passing grade or for a University arbitrarily to dismiss him. The instructor allegedly said that he would not assign a passing grade no matter how well the student performed certain make-up work. The Court held that the substance of the factual allegations presented an issue not appropriate for resolution by summary judgment. However, Wojloh has abandoned his due process claims and cannot rely on *Connelly*. Furthermore, *Connelly* states unequivocally that the question of whether or not the student should have received a passing grade or been dismissed is exclusively an internal matter, not for interference by the Courts.

Finally, Wojloh cites *Barnes v. Merritt*, 376 F.2d 8 (5th Cir. 1967) (Petition of Wojloh, page 6) for the proposition that a Motion for Summary Judgment should not have been granted in this case. That case involved a suit against certain public officials who had denied the Plaintiff a liquor license on grounds which were allegedly unconstitutionally discriminatory. The defendants moved for summary judgment without denying the allegations, and the Court of Appeals simply held that, given the state of the pleadings, the District Court's grant of the motion was improper. In Wojloh's case no unconstitutional deprivation appears even on the face of his pleadings, and furthermore defendents denied the allegations and supported their denial with affidavits.

It is submitted that the allegations in the Wojloh's Complaint demonstrate a purely internal dispute between a teacher and his department head and dean, a dispute which can not be elevated to the level of a con-

stitutional issue of free speech. As noted above, the Court of Appeals for the Fourth Circuit said in *Chitwood,* a teacher "does not immunize himself against loss of his position simply because his non-cooperation and aggressive conduct are verbalized." 468 F.2d at 361. Since the allegations of the Complaint do not establish a deprivation of constitutional rights of free speech, a civil rights action is not raised by the complaint nor the affidavits filed in support of the complaint. Consequently, the District Court and the Fourth Circuit were correct in ruling that the complaint should be dismissed, and there is no important question presented to this Court for review.

CONCLUSION

For the foregoing reasons, we respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland
One S. Calvert Street, 14th Floor,
Baltimore, Maryland 21202

DAVID C. HJORTSBERG
Assistant Attorney General
of Maryland,
2525 Riva Road,
Annapolis, Maryland 21401,
267-5174,

WALTER G. LOHR JR.,
Assistant Attorney General
of Maryland,
One S. Calvert Street, 14th Floor,
Baltimore, Maryland 21202,
383-3750,

Counsel for Respondents,
Mathias J. DeVito, et al.,
Constituting The Board of
Trustees of the State
Colleges and Dr. Calvin
W. Burnett, President of
Coppin State College,

I. DUKE AVNET,
222 E. Baltimore Street,
Baltimore, Maryland 21202,
(301) 727-8454,

Counsel for Respondents,
Flossie Dedmond and
Dr. Chester W. Gregory.

February 7, 1975